Of The Injustice

of

Counterfeiting Books

by

Immanuel Kant

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Of The Injustice of Counterfeiting Books

Those who consider the publication of a book to be equivalent to the use of an author's property in the form of a copy (whether the possessor came by it as a manuscript from the author or as a transcript of it from an actual editor), and then, however, via the reservation of certain rights, whether of the author's or of the editor's, who is appointed by the author, want to limit the use of the book only to this, that is, want to impose the rule that it is not permitted to counterfeit the book, cannot, based upon the rationale of this aforementioned consideration, attain this anti-counterfeiting objective. For the author's property in his thoughts or sentiments (even if it were not granted that the concept of such thought or sentiment property has legal merit according to external laws) would remain to him regardless of whether or not that property was used or represented in the form of a counterfeit; and, since an express legal consent given by the purchaser of a book to such a limitation of their property would not likely be granted,* how much less would a merely presumed consent suffice to determine the purchaser's obligation?

[***Footnote:** Would an editor attempt to bind everybody who purchased his work to the condition, to be accused of embezzling the property of another entrusted to him, if, either intentionally, or by the purchaser's lack of oversight, the copy which the purchaser purchased were used for the purpose of counterfeiting? Scarcely anyone would consent to this: because he would thereby expose himself to every sort of trouble about the inquiry and the defense. The work would therefore remain exclusively in the editor's hands.]

I believe, however, that I am justified to consider the publication of a book to be not the trading of a good [in the form of a book] in the trader's own name, but as the transacting of business in the name of another, namely, the author. [By considering the act of publication to be such a transaction], I am able to represent easily and distinctly the wrongfulness of counterfeiting books. My argument, which also proves the editor's right, is contained in a ratiocination; after which follows a second, wherein the counterfeiter's pretension shall be refuted.

I.

Deduction of the Editor's Right against the Counterfeiter

Whoever transacts another's business in his name and yet against his will is obliged to

give up to him, or to his attorney, all the profits that may arise therefrom, and to repair all the loss which is thereby occasioned to either the one or the other.

Now the counterfeiter is he who transacts another's business (the author's) against the other's will. Therefore the counterfeiter is obliged to give up to the author or to his attorney (or the editor) [any profits from the transaction].

Proof of the Major

As the agent, who intrudes himself, acts in the name of another in a manner not permitted, he has no claim to the profit which arises from this business; but the author or editor in whose name he carries on the business, or another authorized controller of the work to whose charge the former has committed the work, possesses the right to appropriate this profit to himself, as the fruit of his property. Besides, as this agent injures the possessor's right by intermeddling, "nullo jure," in another's business, he must of necessity compensate for all damages sustained. This lies without a doubt in the elementary conceptions of natural right.

Proof of the Minor

The first point of the minor is: that the editor transacts the business of the author by the publication. Here, everything depends on the conception of a book, or of a writing in general, as a labour of the author's, and on the conception of the editor in general (be he an attorney or not). Whether a book be a commodity which the author, either through the author's own efforts or by means of another, can traffic with the public, and can therefore transfer the ownership rights of the book, either with or without reservation of certain rights; or whether the book is instead a mere use of his works, which the author can indeed concede to others, but never transfer the ownership rights of; Again: whether the editor transacts his business in his own name, or transacts another's business in the name of another?

In a book, as a writing, the author speaks to his reader; and he who printed it speaks by his copies not for himself, but entirely in the name of the author. The editor exhibits the author as speaking publicly, and mediates only the delivery of this speech to the public. Let the copy of this speech, whether it be in handwriting or in print, belong to whom it will; yet to use this for one's self, or to traffic with it, is a business which every owner of it may conduct in his own name and at pleasure. But to let any one speak publicly, to publish his speech as such, means to speak in his name, and, in a way, to say to the public:

> "A writer lets you know, or teaches you, this or that, etc., through me. I answer for nothing, not even for the liberty, which the writer takes, to speak publicly through me; I am but the mediator of the writer's thoughts coming to you."

That is no doubt a business which one can execute only in the name of another, and never in one's own (as editor). The editor furnishes in his own name the mute instrument of the delivering of a speech of the author's to the public;** the editor can publish the said speech by printing, which consequently shows himself as the person through whom the author addresses the public, but he can do so only in the name of the author.

[****Footnote:** A book is the instrument of the delivering of a speech to the public, not merely of the thoughts, as pictures of a symbolical representation of an idea or of an event. What is here the most essential about it is that it is not a thing, which is thereby delivered, but is rather an opera, namely a speech, and certainly literal. In naming it a mute instrument, I distinguish it from what delivers the speech by a sound, such as a trumpet in music, or the mouths of others.

The second point of the minor is: that the counterfeiter undertakes the author's business, not only without any permission from the owner, but even contrary to the owner's will. Given that he is a counterfeiter because he invades the province of another, who is authorized by the author himself to publish the work: the question is, whether the author can confer the same permission on yet another, and consent thereto. It is, however, clear that, as then each of them--the first editor and the person afterwards usurping the publication of the work (the counterfeiter)--would manage the author's business with one and the same public, the labour of the one must render that of the other useless and be ruinous to both; therefore a contract between the author and an editor that contains the corollary, to allow yet another besides the editor to venture the publication of the author's work, is impossible; consequently the author was not entitled to give the permission to any other, [including by implication a] counterfeiter), and the counterfeiter should not have even presumed this; by consequence the counterfeiting of books is a business totally contrary to the will of the proprietor, and yet undertaken in the proprietor's name.

From this ground it follows that not the author, but the editor authorized by him, suffers damages. For as the author has entirely, without reservation, given up to the editor his right to the managing of his business with the public, or to dispose of it otherwise, so the editor is the only proprietor of the transaction of this business, and the counterfeiter encroaches on the editor, but not on the author.

But as this right of transacting a business, which may be done just as well by another, is not inalienable (jus personalissimum), assuming that no corollary exists otherwise in the

author's contractual agreement with the editor, so the editor, as he has been authorized to have power over the work, also has the right to transfer his right of publication to another; and as the author must consent to this, he who undertakes the business from the second hand is not a counterfeiter, but a rightfully authorized editor, i.e. one to whom the editor, who was appointed by the author, has transferred his power over the work.

II.

Refutation of the Counterfeiter's pretended Right against the Editor

The question remains still to be answered: since the editor projects to the public the ownership over the work of the author, does not the consent of the editor (and by implication also the author, who gave the editor legal control over it) to every use of the work, including reprinting it, result automatically from ownership of a copy of the work, such that such consent is automatically furnished to whoever purchases a copy of the work, however disagreeable such consent to permit counterfeiting may be to the editor? For the prospect of profit has perhaps enticed the editor to undertake, with the risk of having the published work counterfeited, the business of editor, where this risk is more likely since the purchaser has not been excluded from counterfeiting via an express contract, because it would hurt the editor's business if the editor tried to obligate all potential purchasers of the work to agree to a contract forbidding counterfeiting, because potential purchases would generally not consent to such an agreement and therefore would be less likely to purchase a copy of the work. My answer to this question is that the ownership of the copy does not furnish the right of counterfeiting. I prove this by the following ratiocination:

> A personal positive right against another can never be derived from the ownership of a thing only.
>
> But the right of publishing a work is a personal positive right.
>
> Therefore, the right of publishing never can be derived from the ownership of a thing (the copy) only.

Proof of the Major

With the ownership of a thing is indeed accompanied the negative right to resist any one who would hinder me from the use of it at pleasure; but a positive right against a person, to demand of him to perform something or to be obliged to serve me in anything, cannot arise from the mere ownership of a thing. It is true this positive right might by a particular agreement be added to the purchase contract whereby I acquire a property

from anybody; e.g. that, when I purchase a commodity, the seller shall also send it to a certain place free from expenses. But then the right against the person, to do something for me, does not proceed from the mere ownership of my purchased thing, but from a particular contract.

Proof of the Minor

If someone can dispose of something at pleasure in his own name, then that someone has a right to that thing. But if someone can perform only in the name of another, he transacts this business such that the other is thereby bound, as if the business were transacted by himself. (Quod quis facit per alium, ipse fecisse putandus set). Therefore my right to the transacting of a business in the name of another is a personal positive right, to necessitate the author of the business to guarantee something, namely, to answer for everything which he has done through me, or to which he obliges himself through me. The publishing of the work is now a speech to the public (by printing) in the name of the author, and is consequently a business in the name of another. Therefore the right to it is a right of the editor's against a person: not merely to defend himself in the use of his property at pleasure against him; but to necessitate him to acknowledge and to answer for as his own a certain business, which the editor transacts in his name; consequently this is a personal positive right.

The copy, according to which the editor prints, is a work of the author's and belongs totally to the editor after he has purchased it, either in the manuscript form or the printed form, to do with it everything the editor pleases, where said doings can be done in the editor's own name; for that is a requisite of the complete right in a thing, i.e. ownership. But the use, which the editor cannot make of it except only in the name of another (namely the author's), is a business (opera) that this other transacts through the owner of the copy, where in addition to the ownership of the copy, a particular contract is still requisite for other rights to be provided to the owner of the copy.

Now, the publication of a book is a business which can only be transacted in the name of another (namely the author, whom the editor presents as speaking to the public through him); therefore the rights of transacting the business of publishing the book is separate from the rights that are associated with the ownership of a copy of the book. The right to publish the book can legally be acquired only by a particular contract with the author. Who publishes without such a contract with the author (or, if the author has already granted this right to another, i.e. to an authorized editor, without a contract with that authorized editor) is the counterfeiter, who then damages the authorized editor, and must make amends to him for all damages.

Universal Observation

That the editor transacts his business of editor not merely in his own name, but in the name of another*** (namely the author), and without whose consent cannot transact this business at all, is confirmed from certain obligations which fix themselves according to universal acknowledgement.

[***__Footnote:__ If the editor is at the same time also the author, then, however, both businesses (writing versus publishing) are different; the editor publishes as a tradesman, whereas what he published he originally wrote as a scholar or man of letter. But we may set aside such an unusual example of two different roles being held simultaneously by the same person, and restrict our exposition only to that where the editor is not at the same time the author: it will afterwards be easy to extend the consequence to the first case likewise.]

Were the author to die after he had delivered his manuscript to the editor to be printed, and the editor had previously bound himself as the authorized publisher: then the editor would not have the liberty to suppress the manuscript's publication on the grounds that it is his property; but the public has a right, if the author left no heirs, either to force the editor to publish the book or to give up the manuscript to another who offers to publish it. For the publishing of his manuscript is a business which the author, prior to dying, had the intention to transact with the public through the editor, and for which the editor succeeds the author by becoming the agent. The public does not even need to know whether or not the author had this intention, or to agree with the author's intention; the public acquires this right against the editor (to perform something) by the law only. For he possesses the manuscript only on the condition to use it for the purpose of a business of the author's with the public; but this obligation towards the public remains, though that towards the author has ceased by his death. Here the argument is not built upon a right of the public to the manuscript, but upon a business with the author. Should the editor give out the author's work, after his death, mutilated or falsified, or let the necessary number of copies for the demand be wanting; the public would thus be entitled to force him to more justness or to augment the publication, but otherwise to provide for this elsewhere. All of which would not be legally justifiable, were the editor's right not deduced from the legal concept that the editor is transacting a business between the author and the public in the name of the author.

However, to this obligation of the editor's, which will probably be granted, a corresponding right exists, namely, the right to all that, without which the editor's obligation could not be fulfilled. This is: that he exercises the right of publication exclusively, because the rivalry of others in his business would render the transaction of it practically impossible for him.

Works of art, as things, may, on the other hand, be imitated or otherwise modeled, at will, from a copy of them which was rightfully acquired, and those imitations may be publicly sold, without requiring the consent of the author of the original or of the master who supervised the artist in developing the artist's ideas. A drawing, which anyone has drawn, or had engraved by another, or executed in stone, metal, or stucco, may be copied, and the copies publicly sold; as everything, that one can perform with his thing in his own name, does not require the consent of another. Lippert's "Dactyliotec" may be imitated by every possessor of it who understands it, and exposed to sale, and the inventor of it has no right to complain of encroachment on his business. For it is a work (an opus, not an opera; these terms are mutually exclusive) which everybody who possesses it may, without even mentioning the name of the inventor, assume title over it, and also imitate it and use it in public trade, in his own name, as his own.

But the writing of another is the speech of a person (opera); and whoever publishes it can speak to the public only in the name of this other, and say nothing more of himself than that the author makes the following speech to the public through him (Impensis Bibliopola). For it is a contradiction, to make in his own name a speech which he knows, and conformably to the demand of the public, must be the speech of another.

The reason why all works of art of others may be imitated for public sale, but books, to which an editor is designated, dare not be counterfeited, lies in this: that artworks are works (opera), but books are acts (operae); artworks may be as things existing for themselves, but books can have their existence only in a person. Consequently, books belong to the person of the author exclusively;**** and the author has an inalienable right (jus personalissimum) always to speak himself through every other, that is, nobody dares make the same speech to the public except in the author's name.

[****__Footnote:__ The author, and the owner of the copy, may both say of it with equal right: "It is my book!" However, each would say this in a different sense. The author takes the book as a writing or a speech; the owner interprets the book as being the mute instrument merely of the delivering of the speech to him or to the public, that is, as a copy. The author does not have ownership rights over the thing, namely, the copy of the book (for the owner may burn that copy before the author's face); instead, the author has an innate right, in the author's own person, to wit, to hinder another from reading the copy to the public without the author's consent, which consent can by no means be presumed, because the author may have already given it exclusively to another editor.]

But while altering (abridging, augmenting or retouching) the book of another, such as to re-work the book into what is substantially a new book, such that it would be wrong to publish the new book in the name of the author of the original book, the retouching of a book, in the proper name of the publisher, is no counterfeit, and therefore is not

prohibited. For here, another author transacts, via his editor, another business transaction that is different from the initial business transaction transacted
by the initial author, and consequently does not intrude upon the initial author's initial business transaction with the public; he represents not that author, as speaking through him, but another. Similarly, [I believe that the unauthorized] translation of an author's work into another language cannot be considered to be a counterfeit; for the translated book is not the same speech of the author, though the thoughts may be exactly the same.

If the idea of a copyright, or of the publication of books in general, that were demonstrated in this essay, were well-understood, and precisely elaborated (which, flattering myself, I think is possible), with a formality that was at the level of Roman juridical learning, a complaint against a counterfeiter might be brought before a court, without first needing to ask for a new law to structure the due process proceedings that would govern such a lawsuit against a counterfeiter.